

JacksonLewis

Plenary Topics

Practical Considerations That Serve as the
Foundation for Compliance

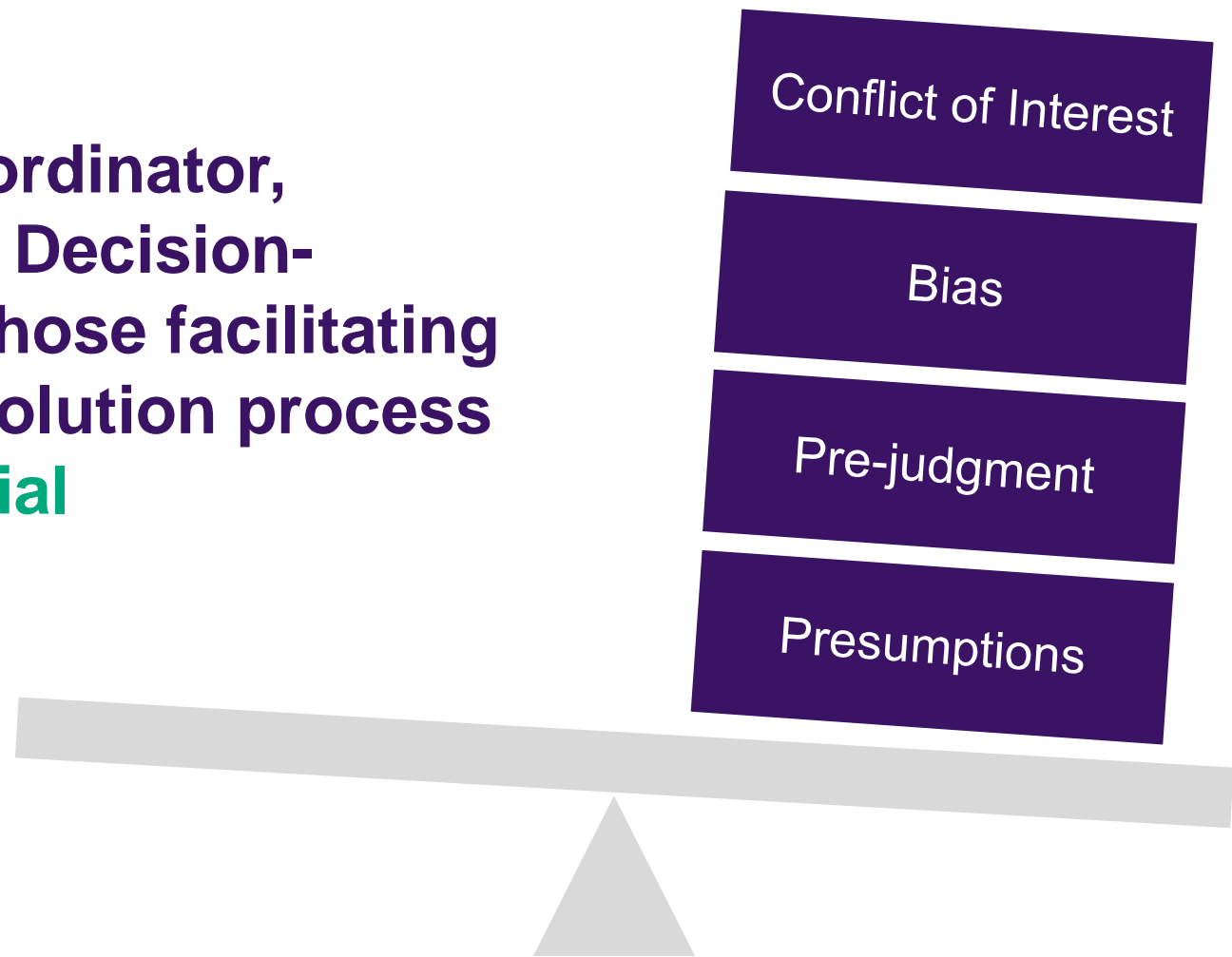


Agenda

1. Serving with Impartiality
2. Title IX Definitions
3. Considering Trauma
4. Spotlight Issue: Consent

Serving with Impartiality

**The Title IX Coordinator,
Investigator(s), Decision-
maker(s), and those facilitating
an informal resolution process
must be impartial**



Conflict of Interest: Do you have a dog in the fight?

Key Question

Could the outcome of this case impact me one way or another?

Sources of Conflict

Relationships
Financial interests
Programmatic interests

General Rule

Conflicts of interest should always be disclosed
They may be waived, but not by the person with the conflict

Important Point

The perception of a conflict of interest can be damaging even if your judgment is not actually compromised

Implicit Bias: **Mental shortcuts sacrifice accuracy**

Working Definition

Mental shortcuts used (often unconsciously) to process information and make assessments quickly

Problem

When we rely on a bias rather than observation and analysis, we sacrifice some level of accuracy

Reality

It's hard to eliminate bias entirely, but by becoming more aware of our biases, we can consciously guard against making decisions based on them

Warning

Watch out for your Durham District Attorney Lacrosse case, whatever it may be

Generational/Cultural Bias: What's wrong with kids today?

Working Definition

Conscious or unconscious value judgments about youth culture and/or sexual expression

Problem

Allowing personal reactions of shock, disgust, or simple incomprehension to influence investigatory or adjudicatory decisions

Reality

Your job is to evaluate behavior relative to school policies and prescribed definitions of prohibited conduct

Warning

Unfamiliar behavior may be less relatable and therefore feel more worthy of suspicion or condemnation

Pre-judgment: *Keep keeping an open mind*

Sizing up Quickly

Classic “two drunk kids” case
“I had one almost exactly like this last year”

Primacy Bias

Allowing the first version you hear to carry too much weight

Confirmation Bias

Becoming invested in one theory or explanation and latching onto evidence that supports it

The Warehouse Door

Failing to consider alternative explanations

Presumptions

**Your Go-To
Explanation for
Behavior is
Right... Some
of the Time**

Example 1

Lack of Physical Resistance on Part of Complainant

- Consent
- Fear that resistance will result in violence
- Surprise, confusion, and/or embarrassment
- Intimidation/Sense of futility based on size and strength
- Dissociation
- “Freeze” reflex

Presumptions

**Your Go-To
Explanation for
Behavior is
Right... Some
of the Time**

Example 2 Delayed Reporting on Part of Complainant

- Embarrassment and/or shame
- Consent followed by regret
- Fear of retaliation
- Confusion around procedure or standards
- Sense of futility
- Denial

Presumptions

**Your Go-To
Explanation for
Behavior is
Right... Some
of the Time**

Example 3

Changing/Inconsistent Details Provided by Complainant or Respondent

- Discomfort sharing sexually explicit content
- Dishonesty
- Protecting others
- Fear of punishment for drinking, etc.
- Attempt to make account more believable/acceptable
- Dissociation/PTSD
- Evolving understanding of self and others

Title IX Definitions

Critical Importance of Foundational Definitions

The foundational definitions are central to the Title IX grievance process

Relevant definitions should be referred to often and must guide Title IX team actions

FOUNDATIONAL DEFINITIONS

Complainant

An individual who is alleged to be the victim of conduct that could constitute Sexual Harassment. A Complainant may be female, male, or non-binary.
Non-neutral language: ~~Victim~~ ~~Survivor~~

Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute Sexual Harassment.
A Respondent may be female, male, or non-binary
Non-neutral language: ~~Perpetrator~~

Recipient

Any institution, organization, or other entity or person to whom Federal financial assistance is extended either directly or indirectly through another recipient.

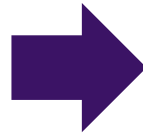
Education Program or Activity

All the operations of a college, university, postsecondary institution, or a public system of higher education. Includes locations, events, or circumstances over which the recipient exercised substantial control over both the Respondent and the context in which the Sexual Harassment occurs and any building owned or operated by a student organization that is officially recognized by the recipient.

FOUNDATIONAL DEFINITIONS

Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:



Quid Pro Quo

Unwelcome Conduct

Sexual Assault

Dating Violence

Domestic Violence

Stalking

FOUNDATIONAL DEFINITIONS **Sexual Harassment**

Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

Examples

Tashia visits Professor Jadi's office to discuss her final grade. Professor Jadi tells Tashia that her grade for the course can go from an 88 to a 90 if Tashia will simply agree to one date.

Chris is a senior who has waited his whole college experience to participate in a study-abroad program in Germany. Chris missed the deadline to sign up for a trip by 2 days and is distraught when he goes to the administrative employee approving students' participation in the trip. The employee tells Chris that as a special favor, his study-abroad application can be approved and he should provide a German-style nude photo as a thank-you.

FOUNDATIONAL DEFINITIONS

Unwelcome Conduct

Unwelcome conduct determined by a reasonable person to be so **severe**, **pervasive**, and objectively **offensive** that it effectively **denies a person equal access** to the recipient's education program or activity.

Sexual Harassment

Examples

Conduct Examples

NO: A stray offensive remark; cat-calling; crude and/or creepy behaviors?

YES: Physical and/or verbal conduct that rises to the level of abuse

Effective Denial Examples

Skipping class to avoid an alleged harasser

Decline in student's GPA

Difficulty concentrating in class

**** No concrete injury is required to meet this element***

FOUNDATIONAL DEFINITIONS Sexual Harassment

Dating Violence

Violence committed by a person

- A. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- B. Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - 1. The length of the relationship
 - 2. The type of relationship
 - 3. The frequency of interaction between the persons involved in the relationship

Threats

Assault

Battery

FOUNDATIONAL DEFINITIONS Sexual Harassment

Domestic Violence

Felony or misdemeanor crimes of **violence** committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Threats

Assault

Battery

FOUNDATIONAL DEFINITIONS Sexual Harassment

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

- A. Fear for his or her safety or the safety of others; or
- B. Suffer substantial emotional distress.

Suggested Model Definition

Following or engaging in a course of conduct on the basis of sex with no legitimate purpose that puts another person reasonably in fear for their safety or would cause a reasonable person under the circumstances to be frightened, intimidated or emotionally distressed.

Example

Seth asks Sonjay out on a date, and Sonjay declines. Subsequently, Seth sends Sonjay numerous flirtatious Instagram messages, prompting Sonjay to ask him to stop because the messages made him feel uncomfortable. Seth proceeds to show up outside Sonjay's dorm and attempts to speak with him. Seth also asks Sonjay to be his private tutor and gives him a three-page letter expressing his romantic feelings for him.

FOUNDATIONAL DEFINITIONS Sexual Harassment

Sexual Assault

Any forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation, including:

Rape

Sodomy

Sexual Assault with an Object

Fondling

Incest

Statutory Rape

FOUNDATIONAL DEFINITIONS Sexual Harassment

Sexual Assault

Rape

The **carnal knowledge** of another person, without the consent of that person

Defining the definition

Carnal knowledge

Sexual intercourse between at least two people, where there is at least some penetration of a vagina by a penis however slight

FOUNDATIONAL DEFINITIONS Sexual Harassment

Sexual Assault

Sodomy

Oral or anal sexual intercourse with another person, forcibly and/or against the person's will OR not forcibly against the person's will in instances where the victim is incapable of giving consent because of their youth or their temporary or permanent mental or physical incapacity.

Defining the definition

Intercourse

The physical activity of sex, requiring penetration however slightly of:

- An anus with a penis
- An anus with a tongue
- A vagina with a tongue
- A mouth with a penis
- A mouth with a vagina

FOUNDATIONAL DEFINITIONS Sexual Harassment

Sexual Assault

Sexual Assault with an Object

To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will OR not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

Defining the definition

Object or instrument?

Any inanimate object or any part of a person's body not covered under rape or sodomy, including digital penetration.

FOUNDATIONAL DEFINITIONS Sexual Harassment

Sexual Assault

Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will OR not forcibly or against the person's will in instances where the victim is incapable of giving consent because of their youth or because of their temporary or permanent mental or physical incapacity.

Defining the definition

Private body parts?

Another person's breasts (male and female), buttocks, genital area, and mouth.

Considering Trauma

Trauma-Informed Skills for Speaking with Parties

Before getting into deep water...

- Do your research on cultural considerations and related challenges or barriers
- Help the party feel safe and comfortable
 - Allow them to sit where they feel most comfortable
 - Let them know you have tissues, water, etc. available if needed
 - Consider whether your background is calming if in a virtual meeting
- Seek to understand what may be happening in the person's life
 - Family issues • Medical • Other recent traumatic experiences
- Ask them about their pronouns and/or how they would like you to refer to the other party
- Actively listen, which will likely make the party feel more comfortable to share their experiences

Trauma-Informed Skills for Speaking with Parties

When addressing core issues...

- Take the time to affirm their experiences and treat them as human
- Parties are more likely to recall information if they feel calm and relaxed
- Work towards making the party feel **supported** and **heard**
- Say affirming, un-biased human comments: “Thank you for sharing your experience with me.”
- Avoid phrasing that is likely to make the party feel defensive
- Remember that party responses may be the result of fear, confusion, or trauma as opposed to deception
- Ask clarifying questions **after** you have given the party an opportunity to get comfortable and share their experiences
- Become comfortable with silence and gaps in conversation
- Don’t rely on assumptions – ask, ask, ask



Neurobiology of Trauma

Trauma prompts the brain to focus on survival, not peripheral details

Sample Questions:

- What, if anything, can't you forget about this experience?
- What was going through your mind during this experience?
- What was the most difficult part of this experience for you?
- What are you able to remember about this experience from your five senses – what did you hear, smell, etc.

Consequences of Trauma

Remain aware that individuals who have experienced trauma often engage in high-risk health behaviors:

- Suicide attempts
- Alcohol and drug use
- High-risk sexual behaviors
- Re-engaging in sex (consensually) with a perpetrator

Be aware of any reporting obligations



A cluster of small, bright white lights in the top-left corner, with several beams of light radiating outwards across the dark background.

Spotlight Issue:
Consent

A horizontal, glowing white beam of light at the bottom of the slide, fading into the dark background on both sides.

Consent

A voluntary and knowing affirmative decision to engage in mutually acceptable sexual activity

Coercion

Physical force, threat of harm, undue pressure, isolation, confinement

Incapacity

Alcohol/Drugs, mental impairment, age, asleep, passed out, unconscious

Incapacity

A state in which someone cannot make rational, reasonable decisions about sexual activity because the person cannot understand the nature or consequence of the sexual interaction, *i.e.* the “who, what, when, where, why, or how”

Incapacitation is **not** the same as being under the influence or intoxicated

Indicators

Falling/Unable to stand
Passing in and out
Vomiting
Confusion
Heavily slurred speech

One's own intoxication/incapacitation is not a defense to failing to reasonably perceive someone else's incapacitation or consent

Model Definitions

Mental and/or Physical Incapacitation

Mental Incapacitation

A person is mentally incapacitated when they are rendered substantially incapable of appraising the nature of the other person's conduct and/or resisting a sexual act.

Physical Incapacitation

A person is physically incapacitated when they are unconscious, physically unable to resist a sexual act, or physically unable to communicate unwillingness to submit a sexual act.

Consent

A voluntary and knowing **affirmative** decision to engage in mutually acceptable sexual activity

Affirmative Consent

No one can initiate sexual activity with you unless/until you consent

Implied Consent

Anyone can initiate sexual activity with you unless/until you object

Implied Consent Environment

Anyone can initiate sexual activity with you unless/until you object

Key factor to look for is the objection, the **“NO.”**

Affirmative Consent Environment

No one can initiate sexual activity with you unless/until you consent

Key factor to look for is the assent, the **“YES.”**

So...

What if there is not a clear yes or no?

In an affirmative consent environment, the sexual activity would be non-consensual.

(Regardless of whether the “no” was unclear, muted, or even non-existent.)

Why? Because you need a clear “yes” for sexual activity to qualify as consensual.

Silence, passivity, or lack of active resistance does not constitute consent.

So...

What qualifies as a **yes**?

~~Saying yes to the sexual activity on a previous occasion?~~

~~Saying yes to other sexual activity?~~

~~Saying yes initially, then having a change of heart?~~

~~Being in some kind of dating or intimate relationship?~~

~~Accepting gifts, flirting, or leading someone on?~~

~~Going to someone's room/house/apartment?~~

So...

Really, what qualifies as a **yes**?

It is a fact-specific and policy-specific inquiry

Focuses on Respondent's perception: Did Respondent reasonably perceive consent? It is judged by a reasonable (sober) person standard: Should the Respondent have known that consent was lacking?

Respondent needs clear words or actions that say **yes**.

Both verbal and non-verbal cues count in the analysis.

Stop.
Seek clarification.
Do not proceed without clear positive signal.

Positive Signals of Invitation

“That feels good.”

“I like that.”

“Don’t stop.”

Responsive touching

“Uh-huh”

“I want to _____.”

“Why not.”

Negative Signals of Hesitation

“I’m not sure.”

“I don’t know.”

“Don’t. Stop.”

Pushing away, turning head away

“Huh-uh”

“I don’t want to _____.”

“Maybe we shouldn’t.”

Ambiguous Signals ????

“Please.”

Little sounds.

Tears

Lying still.

“Huh”

Nervous laughter

“Kind of”

SMALL GROUP DISCUSSION

Communicating Consent

List and Share

1. A way of saying **yes** – a positive signal of invitation
2. A way of saying **no** – a negative signal of hesitation
3. An ambiguous communication that could be a positive or negative signal

Each communication may be verbal or non-verbal

Other Important Considerations:
A Conversation about
Disabilities & FERPA

**Disability
Intersection**
Five
Things to
Know

- 1 Accommodations (including potentially delays) are available in connection with grievance procedures (not just in connection with classes and physical access)
- 2 The impact of an individual's disability may also be substantively relevant to the investigation and resolution of allegations
- 3 If that is the case, we strongly consider seeking additional learning while avoiding stereotyping
- 4 **Three critical levels:** 1. Learning about the disability generally; 2. Learning about how the disability typically impacts this individual; and 3. Learning about the specific impact, if any, in the interaction(s) in question
- 5 **When in doubt, ask!**
Title IX Coordinator...ask Disability Services Coordinator
Everyone else...ask Title IX Coordinator

**FERPA
Intersection
Five
Things to
Know**

- 1** Among other things, FERPA gives students the right not to have personally identifiable information (PII) from education records disclosed without consent (subject to exceptions)
- 2** Education records and PII defined broadly
- 3** Can always disclose with student consent
- 4** “Other school officials” exception allows for sharing within the Title IX grievance process
Subpoenas can override FERPA but are subject to highly specific notification requirements. Involve counsel
- 5** **When in doubt, ask!**
Title IX Coordinator...ask Legal Counsel and/or Registrar
Everyone else...ask Title IX Coordinator

FERPA: Education Records & PII

Education Records & PII are defined broadly:

- Directly related to a student and maintained by the school
- Not sole possession records, law enforcement unit records, employment records, medical records, or post-attendance records
- PII includes (but is not limited to): name; Social Security Number; student number; other indirect identifiers (birthdate and place); information that can be used by a reasonable person in the school community to identify the student

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Thank **you.**

Contact Us



Susan D. Friedfel

Principal

914-872-8027

Susan.Friedfel@jacksonlewis.com



Monica H. Khetarpal

Principal

312-803-2529

Monica.Khetarpal@jacksonlewis.com

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